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No. 86-130

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

VICKIE LORENE ROCK,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

DAVID M. HEILBRON
Counsel of Record
CHRISTOPHER BERKA
MCCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000
Attorneys for Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

The Product Liability Advisory Council ("PLAC") and the Motor Vehicle Manufacturers Association ("MVMA") move for leave to file the attached *amicus curiae* brief in support of the respondent State of Arkansas. The respondent has consented to the filing of the brief; a copy of its written consent is filed with the Court. The consent of the petitioner was requested but refused. This motion is filed, therefore, in accordance with Supreme Court Rule 36.3.

The nature of PLAC's and MVMA's interest in this case, the factual and legal issues presented in their brief, and the relevance of those issues to the case are identified in Part I of the brief, entitled Introduction and Summary, which is incorporated herein.

PLAC and MVMA request that this motion be granted.

Respectfully submitted,

DAVID M. HEILBRON
Counsel of Record
CHRISTOPHER BERKA
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000
Attorneys for Amici Curiae

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BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

I. INTRODUCTION AND SUMMARY

The Product Liability Advisory Council ("PLAC") and the Motor Vehicle Manufacturers Association ("MVMA") submit[1] this *amicus curiae* brief. PLAC is a non-profit membership corporation[2] whose principal

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[1] A motion to file this brief is attached.

[2] PLAC members are American Honda Motor Co., Inc., American Telephone & Telegraph, Automobile Importers of America, Inc., Bell Helicopters Textron Inc., Black & Decker Co., the Budd Co., Clark Equipment Co., FMC Corp., Fiat Auto U.S.A. and Ferrari,

purpose is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability. MVMA is a trade organization [3] whose member companies build over ninety-nine percent of all motor vehicles produced in the United States.

The specific issue in this case is whether Arkansas' exclusion of a criminal defendant's hypnotically induced testimony violated that criminal defendant's Constitutional right to testify in his own behalf. MVMA and PLAC do not have experience or expertise in the criminal law, and therefore take no position on that specific issue. However, Petitioner's brief appears to go beyond that issue, for it suggests that hypnotically induced testimony ought to be admissible, in general, in any case; cross-examination, it says, "is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony." (Petitioner's Brief, p. 13)

MVMA and PLAC oppose admission of hypnotically induced testimony in general, and in particular in the civil cases in which we are experienced. It is not reliable, and the overwhelming consensus of expert opinion holds that it is not. Trials are meant to find the truth. Hypnotically induced testimony subverts the search for truth and, we believe, undermines the integrity of the trial system.

N.A., The Firestone Tire & Rubber Company, Fruehauf Co., Great Dane Trailers, Inc., International Playtex, Motor Vehicle Manufacturers Association of the United States, Inc., Nissan Motor Corp., Otis Elevator Co., Porsche Cars North America, Inc., Sturm, Ruger & Co., Subaru of America, Inc., and Toyota Motor Sales, U.S.A., Inc.

[3] MVMA members are American Motors Corp., Chrysler Corp., Ford Motor Co., General Motors Corp., Honda of America Mfg., Inc., LTV Aerospace & Defense Co., AM General Division, M.A.N. Truck & Bus. Corp., Navistar International Corp., PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corp.

This is not a view held in the abstract. We have seen hypnotically induced testimony at work, and the problems with it are very earthy and very real. We believe it may be helpful to share with the Court one example, which, we believe, shows how hypnosis actually does its job, and what it can do to a lawsuit. Then, citing to that example, we discuss the dangers of hypnosis when used to restore memory, review the law dealing with hypnotically induced testimony,[4] and comment briefly on the *Rock* case so far as it concerns the admission of hypnotically induced testimony in general.

II. A CASE IN POINT

Sprynczynatyk v. General Motors, 771 F.2d 1112 (8th Cir. 1985), *cert. den.* 106 S.Ct. 1263 (1986) (No. 85-1045) is a case in point. The case received some national attention, and was the subject of a session of "60 Minutes" (although not with regard to the hypnosis issue). This is what happened:

The Accident

A fourteen year old boy drove a 1980 General Motors Chevrolet Citation down a steep, washboard gravel road near Bismarck, North Dakota. The car picked up speed. The boy jerked the car back and forth across the gravel, panicked, and lost control. The car went off the road. His mother, who was with him, was very badly hurt. She and her husband sued General Motors.

After the accident the boy said and swore three times he had not touched the brakes.[5] But plaintiffs' product liability theory called for the boy to have hit the brakes. The boy was then sent to Texas to be hypnotized. The

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[4] Most of which is not dealt with in Petitioner's brief.

[5] For example, twelve days after the accident the boy swore "I didn't apply the brakes at all. I just took my foot off the gas and it started going over." The boy was deposed before hypnosis, and said again that that was his best recollection. See 771 F.2d at 1115.

hypnotist did business with plaintiffs' counsel, and knew what counsel was interested in.

The Hypnosis Session

When the hypnosis session began, the hypnotist put a ring on a coffee table, and told the boy to focus on it and be filled by it. "Let yourself go," the hypnotist said. Then he said you are going down some stairs, and the door to your unconscious is at the bottom of them. The boy replied that the door had a silver handle. The hypnotist said open it. The boy raised his hand, and opened it.

The hypnotist assured the boy that "the mind can reach back and recollect things that you never thought were possible," and "we only have to reach back and recall it . . . . I'm going to let you show me how well you can do that now." Go back to the day of the accident "in a time machine," he went on.

The hypnotist took the boy through the accident day and the evening, and then up the gravel hill, and down it. The hypnotist praised the boy, and said he and his family were proud of him, as they went along. When they started down the hill, the hypnotist asked the boy where his feet were. The hypnotist kept asking: Where is your left foot, where is your right foot, where are your feet? Thirty-two times he asked that, and (although he did not mean to) his voice rose some as he did. The boy did not answer that he had hit the brakes until, finally, this happened:

> "RODNEY: Uh-huh. And I see that I'm going to go in the [left] ditch and hit the fence.
>
> "HYPNOTIST: You see you are going to hit it. What are you going to do? Where is your right foot?
>
> "RODNEY: On the brake.
>
> "HYPNOTIST: What are you doing with your right foot and how much pressure are you putting on the brakes?

"RODNEY: Pushing.

"HYPNOTIST: How hard?

"RODNEY: Hard.

"HYPNOTIST: As hard as you can?

"RODNEY: Uh-huh."

See 771 F.2d at 1115.

Plaintiffs' attorney was watching outside the room through a one-way mirror. Shortly after that exchange, the hypnotist left the boy, and went out to talk with plaintiffs' attorney. The hypnotist came back, asked a few more questions, and said he was "very, very pleased." Then he told the boy to walk back through the door with the silver handle and up the stairs. He said you will be in a "beautiful place" when you get to the top, "where you love everybody and everybody loves you," and "you feel terrific."

The boy and the hypnotist smiled and shook hands, and the session ended. The boy felt greatly relieved after hypnosis, as if a burden had been lifted from his shoulders. This was all recorded on video tape.

The Trial and Appeal

The boy's hypnotically induced memory replaced his pre-hypnosis memory, and, over objection, the boy testified to his hypnotically induced testimony at trial. His testimony established the first premise of plaintiffs' liability theory, that the boy had hit the brakes. The jury returned a verdict for plaintiff. 771 F.2d at 1116. The Eighth Circuit reversed, finding that the trial court had erroneously admitted a videotape of the hypnosis session to establish the truth of what the boy said during the session. The Eighth Circuit instructed the trial court on remand not to admit the hypnotically induced testimony if, after hearing, the Court found it "tainted." 771 F.2d at 1123. This Court denied certiorari. 106 S.Ct. 1263 (1986) (No. 85-1045). The case is no longer pending.

III. THE DANGERS OF HYPNOSIS

The decision of the Supreme Court of Arkansas in this case is based in part on the writings of Drs. Bernard Diamond and Martin Orne, 708 S.W.2d at 80-81; Dr. Diamond filed an affidavit and Dr. Orne testified in the *Sprynczynatyk* case. They are the "most persuasive spokesmen for the relevant scientific community," and the "majority are in full agreement with [their] essential findings and conclusions." See *People v. Shirley*, 31 Cal. 3d 18, 63, 641 P.2d 775 (1982), *cert. den.*, 458 U.S. 1125 (1982).

Dr. Diamond is a professor of psychiatry and law at the University of California, and "the author of numerous articles in the area of psychiatry and the law." Dr. Orne has been president of the International Society of Hypnosis, director of "one of the nation's most active laboratories of hypnosis research," the editor of the International Journal of Clinical and Experimental Hypnosis, a "senior author of the article on hypnosis in the Encyclopaedia Britannica," and the "author of leading articles on hypnosis research in the scholarly journals." His "eminence" has "repeatedly been recognized" in the case law. See *People v. Shirley*, 31 Cal. 3d 18, 63, 641 P.2d 775 (1982).

As the Arkansas Supreme Court noted, "hypnosis may have gained recognition [from experts] as an aid to therapy," 708 S.W.2d at 80; it may serve its therapeutic goal regardless whether what the patient "relives" is fact or fantasy.[6] But hypnosis meant to refresh or re-

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[6] Hypnosis may also be a useful investigative tool, recognizing that each item is merely a lead and nothing else. A lead is not testimony. It can simply be followed, and may turn something up—or prove an embarrassment. (Orne, "The Use and Misuse of Hypnosis in Court," in Critical Issues in American Psychiatry and the Law, Vol. 2 (Richard Rosner, ed.) 1985, pp. 219, 227.) But see Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," 68 Calif. L. Rev. 313, 332 (1980): "[T]he value of hypnosis for investigative purposes has been greatly over-

form one's memory so he may testify to it is something else; there it matters whether what the patient relives—and testifies to—is fact or fantasy.

As the Arkansas court also noted, hypnosis "has not gained general acceptance as a means of ascertaining truth in the field of forensic law", *ibid.*, because hypnosis as truth finder is unreliable. The experts, and in particular Drs. Orne and Diamond, have explained why. These are the main reasons; the *Rock* court cited to each of them.

Suggestion. One under hypnosis suspends critical judgment, and wants very much to please the hypnotist. Consequently, he is "extremely suggestible." *Rock*, 708 S.W. 2d at 80 (quoting Diamond). That is the hallmark of hypnosis. Suggestions may be implicit, and come from tone of voice. When made they "contaminate" the patient's memory, because they change it. (*Ibid.*; Orne, et al., "Hypnotically Induced Testimony," in *Eyewitness Testimony: Psychological Perspectives*, G.L. Wells and E.F. Loftus, eds.) 1984, pp. 174, 190, 196.

The suggestions may be very subtle. For example, the *Sprynczynatyk* hypnotist's 32 questions about the boy's feet were suggestions, for they told the boy what the hypnotist was interested in. The hypnotist's advice that "the mind can reach back and recollect things . . . . We have only to reach back and recall it" was also a suggestion—very powerful—that the subject has it "all in his head"; that kind of suggestion encourages invention. See Orne, "The Use and Misuse of Hypnosis in Court," in *Critical Issues in American Psychiatry and the Law*, Vol. 2 (Richard Rosner, ed.) 1985, p. 219.

Suggestions can also be quite unintentional. A hypnotist is apt, by subtle cuing, unwittingly to suggest re-

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stated . . . [W]hatever can be done by hypnosis can also be done without hypnosis; it merely takes longer and requires greater skill and patience."

sponses to the subject in hypnosis. (See Orne, "The Forensic Use of Hypnosis," U.S. Department of Justice, National Institute of Justice/Research in Brief, December 1984, p. 4; Diamond, *supra* at 333; Laurence and Perry, "Hypnotically Created Memory Among Highly Hypnotizable Subjects," 222 *Science* 523, 524 (November 4, 1983); *Rock*, 708 S.W.2d at 81.) For example, the *Sprynczynatyk* hypnotist testified that he tried not to suggest anything, although he did. Suggestions are also very hard to detect. Even an expert examining a videotape of a hypnosis session may not be able "to identify possible cues." *Id.*, at 82, n.2.

Suggestions, witting or not, are effective. For example, Dr. Orne testified that the *Sprynczynatyk* hypnotist's suggestions would "assure a change in memory."

Confabulation. One under hypnosis may "confabulate." Confabulation means making up details one does not recall but that seem to fit. *See* 708 S.W.2d at 81.[7] Neither the hypnotist nor patient can tell what is confabulation and what is real memory without checking what the patient says against objective data. Neither can a trier of fact, or anyone else. (*See* American Medical Association, Council on Scientific Affairs, "Scientific Status of Refreshing Recollection by the Use of Hypnosis," 253 Journal of the American Medical Association 1918, 1922 (April 5, 1985); *Rock*, 708 S.W.2d at 80, 81, quoting Diamond and Orne.)

For example, the *Sprynczynatyk* hypnotist could not really tell what was real and what made up. But the boy said three things which could be checked against objective data. They showed he confabulated. Thus under hypnosis he said he watched "The Price Is Right" on TV on the accident day, but it was on before he got up; he said he

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[7] The hypnotized person "translate[s] hunches, beliefs, and fantasies into memories, recollections, and reported facts." Orne, et al., "The Forensic Use of Hypnosis," U.S. Department of Justice, National Institute of Justice/Research in Brief, December 1984, p. 4.

watched "The Beverly Hillbillies" also, but it was not on at all that day; and he said his sister fed the dogs, but she was out of town.

Hopes. Hypnosis plays on hopes and fantasies, and in hypnosis a strong hope very likely will become memory.[8] (See Orne, "The Use and Misuse of Hypnosis," *supra* at 216; cf., *Rock*, 708 F. S.W. 2nd at 81.)

For example, before hypnosis the *Sprynczynatyk* boy had heard about some brake problem in Chevrolet Citations. He wanted to be hypnotized to find out whether the accident was his fault or the car's, and naturally he hoped very much it was the car's. He followed where he was led; no doubt any human being would have wanted to get there.

Altered Witness. One believes that what he relives in hypnosis really happened, and with great conviction. Believing he has found truth, he will likely be a most confident witness.[9] Indeed, he "dissociates accuracy of memory from confidence" in memory (Orne, "Hypnotically Induced Testimony" at 193,) and becomes "immune to all cross-examination." Diamond, *supra* at 336; Rock, 708 S.W. 2d at 81.

In sum, neither subject nor hypnotist can tell whether what the subject says in hypnosis is fact or fantasy. That is so no matter how conscientious the hypnotist.[10]

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[8] *Cf. People v. Shirley*, above, 31 Cal. 3d at 31-32 (where subject has motive to distort truth "to make himself look better in the eyes of others," hypnosis gives him "permission" to distort).

[9] The *Sprynczynatyk* hypnotist repeatedly asked the boy to describe details as to what happened on the accident day. As Dr. Orne testified, those questions elicit answers that convince the patient that what he says "must have been so, because otherwise why would I know all those details?" The patient believes, again, that he has found truth. See *Rock*, 708 S.W.2d at 81.

[10] That is also true even where one has no memory before hypnosis. When one has memory of an event, it is extremely unlikely

IV. THE LAW

As the Supreme Court of Arkansas found, there is a "current trend toward exclusion" of hypnotically induced testimony. *Rock*, 708 S.W. 2d at 79. In fact, the majority of jurisdictions to pass on the question since 1980 have held the testimony inadmissible. As *Rock* also found, another group of jurisdictions have held the testimony admissible only if "certain safeguards have been followed to minimize . . . [the] dangers" of hypnosis. *Ibid.* We believe the exclusionary rule is the better rule and, according to McCormick, it is now the "prevalent" rule. (Cited at *Rock*, 708 S.W. 2d at 80). We discuss the exclusionary rule first (Part A, below), and then the safeguards rule. (Part B, below).

A. The Exclusionary Rule; the Old Law and the New Law

In 1968 the Maryland Court of Special Appeals affirmed the admission into evidence of hypnotically induced testimony, the first court in the United States to do so. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. den.*, 395 U.S. 949 (1969). Over the next decade, several jurisdictions followed *Harding*, including the Ninth Circuit, the first and, until the end of 1986, the only federal circuit court, even arguably,[11] to follow it.

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that a different memory generated by hypnosis will be the more accurate one. For the waking memory is far more reliable than the hypnotic memory which comes afterward, and the error rate after hypnosis is three times the error rate in the wake state before that. Dywan and Bowers "The Use of Hypnosis to Enhance Recall," 222 *Science* 184 (October 14, 1983). The unreliability of hypnosis is shown by "over two dozen scientific experiments during the past fifty years." Orne, et al., *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering With Evidence?* U.S. Department of Justice, National Institute of Justice/Issues and Practices (1985).

[11] In *United States v. Kimberlin*, 805 F.2d 210 (7th Cir. 1986), an investigation in which witnesses were hypnotized occurred in 1978, and the trial in 1981. *Id.* at 217. The Court noted that

Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974); *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975); *United States v. Adams*, 581 F.2d 193 (9th 1978); *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979). *Harding* and its descendants did not consider whether hypnosis as memory restorer is reliable or accepted generally or at all by scientists, and did not consult the large body of scientific literature that said it is not. They simply held that the fact a witness has been hypnotized goes to credibility, not admissibility. *See, e.g., Collins v. State.* 52 Md. App. 186, 447 A.2d 1272, 1278 (1982) (commenting on *Harding*); *People v. Shirley*, 31 Cal. 3d 18, 35-36, 641 P.2d 775, *cert. den.*, 458 U.S. 1125 (1982) (commenting on *Harding*'s descendants).

Harding and descendants overlooked *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), and the fifty (now sixty-four) years of precedent that followed it. *Frye* held that the result of a scientific technique (there a lie detector test) is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." 293 Fed. at 1014. Hypnosis is a scientific technique, and hypnotically induced testimony its result. Accordingly, *State v. Mack*, 292 N.W. 2d 764, 767-68 (Minn. 1980) held the *Frye* "general acceptance" test applicable to hypnosis. Thereafter, case after case followed *Mack*, and the "most recent decisions by other

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Harding was then a "leading case." *Ibid.* Although the Court also noted "several dangers . . . associated with hypnosis," and that several jurisdictions had declined to follow *Harding*, it declined to adopt the exclusionary rule or the safeguards rule. The Court stated two reasons: (1) the safeguards were not developed at the time of the *Kimberlin* investigation, and (2) there was "so little probability that any testimony resulting from suggestion or confabulation in the course of hypnosis affected the outcome [in the case]." *Id.* at 219. The Court therefore left to later cases "[w]hatever rules may evolve in this circuit on this subject . . . ." *Ibid.* See also discussion in *Harker v. State of Maryland*, 800 F.2d 437 (4th Cir. 1986).

jurisdictions have consistently applied" *Frye*. *Collins v. State*, 447 A.2d 1272, 1279 (Md. 1982); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E. 2d 1190, 1196 (Mass. 1983) (the "substantial majority" applies *Frye*).[12]

Mack and its descendants exhaustively reviewed the scientific literature and experts' opinions—most prominently Drs. Orne's and Diamond's—respecting hypnosis. Upon that review, *Mack* and every case after it applying *Frye* found that hypnosis, even if properly conducted, fails *Frye's* test: Hypnosis is not "generally accepted" by the scientific community as a reliable means to restore, refresh, or find memory. To the contrary, the "overwhelming consensus of expert opinion" is that it is not reliable, and there is no "doubt" about that. *People v. Shirley*, above, 31 Cal. 3d at 23, 40, 66.

Hypnosis as memory restorer or finder is not generally accepted as reliable by experts in the field for the same reasons Drs. Orne and Diamond have explained it is not: (1) The hypnotic subject is "highly susceptible to suggestion," even "that which is subtle and unintended," and his "critical judgment" is impaired. (2) The subject "has a compelling desire to please the hypnotist by reacting positively to these suggestions." (3) Neither subject nor hypnotist nor anyone else can tell whether a memory generated during hypnosis is fact, fantasy, or confabulation. (4) The subject becomes utterly "convinced of the absolute truth of the account he made while under hypnosis", and it is "impossible to cross-examine such a witness in a meaningful way". E.g., *State v. Mack*, above, 292 N.W. 2d at 768-69; *People v. Shirley*, above, 31 Cal.3d at 43-44; 65-66; *Collins v. State*, above, 447 A.2d at 1280.

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[12] The *Rock* court did not resolve whether *Frye* applied, because it "would find the hypnotically induced testimony inadmissible by either the *Frye* test, or some form of it, or by traditional evidentiary concepts." 708 S.W.2d at 80.

Accordingly, every case following *Mack* and applying *Frye* holds hypnotically induced testimony inadmissible. *Prewitt v. State*, 460 S.2d 296 (Ct. Crim. App. Ala. 1984) (Alabama); *Contreras v. State*, 718 P.2d 129 (Ak. 1986) (Alaska); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982) (Arizona); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981) (Arizona); *People v. Shirley*, 31 Cal.3d 18, 66, 641 P.2d 775, 796 (1982), *cert. denied*, 458 U.S. 1125 (1982) (California); *People v. Quintanar*, 659 P.2d 710, 711 (Colo. App. 1982) (Colorado); *State v. Atwood*, 479 A.2d 258 (Superior Ct. Conn. 1984) (Connecticut); *State v. Davis*, 490 A.2d 601 (Superior Ct. Dela. 1985) (Delaware); *Bundy v. State*, 471 So.2d 9 (Fla. 1985) (Florida); *Walraven v. State*, 336 S.E. 2d, 785 (Ga. 1985) (Georgia); *State v. Moreno*, 709 P.2d 103 (Ha. 1985) (Hawaii); *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983) (Indiana); *State v. Haislip*, 701 P.2d 909 (Kan. 1985) (Kansas); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272, 1283 (1982) (Maryland); *Polk v. State*, 48 Md. App. 382, 427 A.2d 1401 (1981) (Maryland); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (Massachusetts); *People v. Gonzalez*, 415 Mich. 615, 329 N.W.2d 743, 748 (1982) (Michigan); *Alsbach v. Bader*, 700 S.W. 2d 823 (Mo. 1985) (Missouri); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648, 655 (1981) (Nebraska); *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929, 931 (1982) (New York); *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (N.C. 1984) (North Carolina); *Harmon v. State*, 700 P.2d 212 (Ct. Crim. App. Ok. 1985) (Oklahoma); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981) (Pennsylvania); *State v. Martin*, 101 Wash.2d 713, 684 P.2d 651 (Wash. 1984) (Washington); and this case, *Rock v. State*, 708 S.W.2d 78 (Ark. 1986).[13]

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[13] All courts hold that the witness may testify to his prehypnosis recollection, see, e.g., *State ex rel. Collins v. Superior Court*, 644

As for *Harding* and descendants, by 1982 that was "moribund precedent." For in 1981 and 1982 the same Maryland court which decided *Harding* in the first place repudiated it, held that *Mack* and *Frye* govern instead, and so dealt the Harding line its "coup de grace." *See People v. Shirley*, above, 21 Cal.2d at 48; *Collins v. State*, above, 447 A.2d at 1278; *Polk v. State*, above, 427 A.2d at 1046. See *Rock*, 708 S.W.2d at 80.[14]

B. The Safeguards Rule

The Fifth Circuit was the second Circuit, after the Ninth, see p. 11 above, to address the hypnosis issue, and the first since *Mack*. *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984). *Valdez* declined to follow *Frye, Mack et al.*, on the ground that *Frye* applied to testimony of experts, not lay witnesses (like a hypnotized subject.)[15] Instead, *Valdez* looked to Federal Rule of Evidence 403.

Rule 403 provides for exclusion of evidence whose "probative value" is substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *Valdez* reviewed the literature and case law, and found the same shortcomings respecting hypnoti-

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P.2d at 1295, although one holds that he may not testify to his prehypnosis recollection of the event which was the subject of hypnosis. *People v. Shirley*, above. All hold that hypnosis may be used as an investigative tool. *See*, e.g., *State v. Mack*, 292 N.W.2d at 771.

[14] There have been a few cases which have followed *Harding* since 1980. See, for example, *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W. 2d 386, *cert. denied*, 461 U.S. 946 (1983); and *State v. Brown*, 337 N.W. 2d 138 (N.D. 1983) (but noting importance of safeguards and corroboration.)

[15] However, the testimony of the hypnotized subject is the result of a scientific technique, hypnosis. Therefore that testimony is subject to the *Frye* test, and hypnosis fails the test. See subpart A, above.

cally induced testimony that *Mack* did: The subject's suggestibility, his desire to please the hypnotist, the impossibility of telling memory from confabulation, the ineffectiveness of cross-examination. 722 F.2d at 1201-02. Consequently, *Valdez* found the probative value of hypnotically induced testimony low, and the danger of it causing prejudice and confusion high.

Valdez concerned an officer who after hypnosis identified one as the person whom he'd seen at the scene of the crime. The officer knew the person was under suspicion. *Valdez* held (1) where a "hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session." *Valdez* said (2) in other cases, "if adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible"—uncorroborated testimony being, according to experts, "useless." Id. at 1203.

Valdez pointed to *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). *Hurd* struck a middle course between *Mack* and *Harding*. It held that hypnotically induced testimony might be admitted if the hypnosis session followed "rigorous procedural safeguards" meant to guard against "the hypnotic creation of pseudomemories." *Valdez* at 1199.

These are the *Hurd* safeguards *Valdez* pointed to:

> "(1) the hypnotist must be a qualified psychiatrist or psychologist who has experience in the use of hypnosis; (2) the hypnotist 'should' work independently, not as agent for either party to the litigation; (3) all information given to the hypnotist before the hypnosis session must be recorded; (4) before hypnosis, the subject must describe the facts to the hypnotist as he then remembers them; (5) all 'contact' between the hypnotist and the subject must be recorded, preferably on viodeotape; and (6) no person other than hypnotist and subject 'should' be pres-

ent during any 'contact' between the two." *Valdez*, 722 F.2d at 1199; *Hurd*, 432 A.2d at 89.

Sprynczynatyk essentially followed *Valdez* and *Hurd*.

Compliance with those safeguards is a "condition precedent for the admissibility of hypnotically induced recollection" under *Hurd-Valdez*. 432 A.2d at 96; 722 F.2d at 1203.[16]

The safeguards were originally proposed by Dr. Orne. He believed that, for example, the hypnotist should record what he was told before the interview, so there is no doubt what he knew about it; for a hypnotist who knows what is at issue is more apt, by subtle cuing, unwittingly to suggest responses to the subject by hypnosis. Dr. Orne also believed the hypnosis session should be recorded, so there is no doubt what is said during it; that makes it easier to determine when a hypnotist suggests a response during it. Orne, "Hypnotically Induced Testimony," *supra*, at 206.

However, Dr. Orne proposed the safeguards to reduce the danger that hypnosis might intentionally suggest the recollection of helpful facts in jurisdictions where hypnotically induced testimony is admitted, and in connection with the use of hypnosis in investigations. See, e.g.,

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[16] *Hurd's* following includes *House v. State*, 445 So.2d 815. (Miss. 1984); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Weston*, 475 N.E. 2d 805 (Ohio Ct. App. 1984); and the Oregon legislature. (Or. Rev. Stat. § 136.675 (1981.)

Virtually all cases admitting hypnotically induced testimony require a showing that the hypnosis session meets some safeguards, even if not the *Hurd* safeguards. For example, the Ninth Circuit, perhaps the most aggressive jurisdiction, recognizes that hypnosis "carries a dangerous potential for abuse," and requires "at a minimum, complete stenographic records of interviews of hypnotized persons who later testify . . . ." *United States v. Adams*, 581 F.2d at 198-99, n.12. The Ninth Circuit also requires the trial court to hear "objections to the . . . testimony on the ground that such procedures [minimum standards] were not followed." *United States v. Awkard*, above, 597 F.2d at 669, n.2.

Valdez, 722 F.2d at 1200. He recognized, however, that the safeguards do not eliminate the risk of confabulation inherent in hypnosis. Indeed, his opinion is that "[t]here is no way . . . by which anyone (including an expert with extensive experience in hypnosis) can for any particular piece of information obtained in hypnosis determine whether it is an actual memory or a confabulation." Quoted at *Rock*, 708 S.W.2d at 81.

In sum, compliance with the safeguards helps, and is essential if hypnotically induced testimony is to be admitted. But compliance does not change the truth that hypnotically induced testimony is inherently unreliable. Therefore *Mack* and its following, including *Rock*,[17] exclude hypnotically induced testimony entirely; the safeguards alone do not solve the problem. See, e.g., *Collins v. State*, above, 447 A.2d at 1280-81; *Rock*, 708 S.W.2d at 82-83.

The *Mack* rule is the majority rule and the better rule: It is firmly grounded in the "overwhelming consensus" of the scientific community, it protects the integrity of the judicial process, and it ensures that the search for truth is not subverted by what is, ultimately, manufactured evidence.

V. COMMENTS ON ROCK

The consensus among experts is that hypnosis is not reliable to restore memory; *Frye* and traditional evidence concepts require its exclusion. The Petitioner in *Rock* argues, nevertheless, that "the test of intelligent cross-examination is a better means of dealing with" hypnosis than is exclusion. (Petitioner's Brief, p. 13) But hypnosis destroys the ability to cross-examine ,pp. 9-10, 12-13,

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[17] *Rock* also points out, quoting *Shirley*, above, that questions as to whether the guidelines have been complied with "would provide a fertile new field for litigation," and concludes that "the game is not worth the candle."

above, and no one—neither subject, hypnotist nor trier of fact—can determine whether hypnotically induced recall is fact or fantasy.

Petitioner also argues that the exclusion of hypnotically induced testimony "assumes an untruthful and devious hypnotist." (Petitioner's Brief, p. 13) But the dangers of hypnosis are inevitable and are not cured by a well-meaning hypnotist; the dangers are inherent in the process itself.

Finally, petitioner argues that "the burden should be on the prosecution to establish that the testimony is likely the product of improper suggestion." (Petitioner's Brief, p. 6) But *Frye* requires the proponent of the scientific evidence to prove its general acceptance, not the opponent to prove its unacceptance. And *Valdez-Hurd* require the proponent to prove the safeguards were met, not the opponent to show they were not. That is only fair; the proponent sponsors the hypnosis in the first place, and is in the best position to ensure that his hypnotist complies with the safeguards.[18]

In sum, hypnosis as memory restorer is unreliable. Petitioner does not challenge that fact, or meet the case law which excludes hypnotically induced testimony because of that fact.

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[18] The petitioner also suggests that whether hypnotically induced testimony is admissible is a competence question. (Petitioner's Brief, p. 8) It is not. A "previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensibly or understand his duty to tell the truth . . . or of lacking the general capacity both to perceive and remember . . ." *People v. Shirley*, above, 31 Cal.3d at 67. The exclusion of hypnotically induced testimony "does not make incompetent a witness." *United States v. Valdez*, above, 711 F.2d at 1204. Rather, the question is what a competent witness—like the hypnotized witness in *Rock*—could testify to. The answer is she could, like other competent witnesses, testify to some things but not others. She could, and apparently did, for example, testify to her pre-hypnotically in-

VI. CONCLUSION

The *Rock* court's analysis of hypnotically induced testimony accords with the analysis of the scientific community; it accords with the best reasoning of current case law; and it accords with the majority rule in this country.

Respectfully submitted,

DAVID M. HEILBRON
Counsel of Record
CHRISTOPHER BERKA
McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000
Attorneys for Amici Curiae

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duced recollection, but she could not testify to hearsay or some opinions. And she could not testify to her hypnotically induced recollection under *Frye* and, as *Rock* found, "standard rules of evidence." 708 S.W.2d at 85.